No. 11,152

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE COLUMBIAN NATIONAL LIFE INSURANCE COMPANY (a corporation),
Appellant,

vs.

A. QUANDT & SONS (a co-partnership),
Appellee.

BRIEF FOR APPELLANT.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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BRIEF FOR APPELLANT.

STATEMENT OF JURISDICTION.

This is an action brought upon a policy of life insurance, insuring the life of Theodore W. Quandt, issued by the appellant, The Columbian National Life Insurance Company.

The action was filed in the Superior Court of the State of California in and for the City and County of San Francisco, and was removed to the United States District Court, Northern District of California, Southern Division, by the appellant.

The amount sued for was $15,000 and the appellant is a corporation organized and existing under the laws of the State of Massachusetts. (Tr. pp. 2, 3.)

Jurisdiction was conferred on the District Court by Section 24 of the Judicial Code, 28 U.S.C.A. 41.

Judgment was rendered in favor of the appellee. Jurisdiction of the appeal is conferred on this Court by Section 128a of the Judicial Code. (43 Stat. L. 936, 28 U.S.C.A. 225.)

The notice of appeal from the judgment of the District Court appears at page 40 of the transcript.

The judgment appears at page 38 of the transcript.

STATEMENT OF THE CASE.

The appellee, A. Quandt & Sons, was the beneficiary named in a policy of life insurance No. 275203 issued by the appellant on the life of Theodore W. Quandt.

The policy appears at page 7 of the transcript. It was applied for on November 15, 1943. It was delivered on December 4, 1943. Quandt died on April 2, 1944 from a cancer of the bowel.

The appellant denied liability on the policy on various grounds, and tendered a return of all premiums paid.

Thereafter the appellee filed suit on the policy. Appellant's answer to the appellee's complaint raised various defenses, among them that contained in its first separate answer and defense. (Tr. p. 26.) This defense set out:

That Part 1 of the application for the policy signed by the assured provided in part:

> "It is agreed as follows: 1. That the insurance hereby applied for shall not take effect until the issuance and delivery of the policy * * * while the Proposed Insured is in sound health."

that Theodore W. Quandt was not in sound health on December 4, 1943, the date of the delivery to him of the policy of insurance, in that at this time he was suffering from cancer of the bowel, and that by reason thereof and of the provisions of the application the insurance provided for in the policy did not take effect.

The trial was had before the Court sitting without a jury. The Court found that Quandt was in sound health at the time of the delivery of the policy of insurance and that therefore the policy did take effect. (Tr. p. 36.) Judgment was thereupon rendered against the appellant for the face amount of the policy and this appeal has been taken by the appellant.

The question involved on the appeal is whether the trial Court erred in ruling that the assured, Theodore W. Quandt, was in sound health at the time mentioned and that the insurance therefore took effect.

It is not contended here that there is any evidence in the record that the assured knew that he was suffering from cancer at the time of the delivery of the policy. Nor, on this appeal, is any reliance had upon any concealments or misrepresentations made in the application for the insurance by the assured. Although such defenses were urged at the time of trial they are not urged here or relied upon as grounds for reversal.

SPECIFICATION OF ERRORS.

(1) The trial Court erred in making the following findings of fact:

> No. 5 (Tr. p. 34): "* * * at the time of his death the policy of insurance set forth in the complaint was in full force and effect."
>
> No. 11 (Tr. p. 15): "That it is true that at the time of the delivery of said policy of insurance to Theodore W. Quandt, said Theodore W. Quandt, deceased, * * * in accordance with the terms of the policy of insurance was in sound health, and that it is true at said time of delivery said policy of insurance did go into full force and effect."
>
> No. 13 (Tr. p. 36): "That it is true that said Theodore W. Quandt had never had any disease, illness, injury, or operation other than those stated in the application for insurance."

(2) The Court erred in making its conclusion of law that the appellee was entitled to recover against the appellant and in rendering judgment against appellant pursuant to said conclusion of law.

The said findings of the Court were in error because at the time of the delivery of the policy to Theodore W. Quandt he was not in sound health, but was in fact suffering from cancer of the bowel. The evidence in this regard is without conflict and the Court therefore erred in finding that the plaintiff was in sound health.

The application for the policy providing that the insurance was not to take effect unless it was delivered while the insured was in sound health, the Court

further erred in finding that the insurance did take effect and in rendering judgment upon it against the appellant.

SUMMARY OF ARGUMENT.

I.

A provision of an insurance contract: "That the insurance hereby applied for shall not take effect until the issuance and delivery of the policy * * * while the proposed insured is in sound health" is a valid condition of the policy, and the insurance it provides does not take effect if the insured is not in sound health at the time of the issuance and delivery of the policy.

II.

The evidence without conflict shows that at the time of the issuance and delivery of the policy, the insured, Quandt, was afflicted with the cancer of the bowel which caused his death. The Court therefore erred in finding that the insured was in sound health at the time of the delivery of the policy.

III.

Since the insured was not in sound health at the time of the delivery of the policy, the insurance it provided did not take effect and no recovery could be had on the policy. The judgment rendered against the company was therefore in error and should be reversed.

ARGUMENT.

I.

A PROVISION OF AN INSURANCE CONTRACT: "IT IS AGREED * * * THAT THE INSURANCE HEREBY APPLIED FOR SHALL NOT TAKE EFFECT UNTIL THE ISSUANCE AND DELIVERY OF THE POLICY * * * WHILE THE PROPOSED INSURED IS IN SOUND HEALTH" IS A VALID CONDITION OF THE POLICY, AND THE INSURANCE IT PROVIDES DOES NOT TAKE EFFECT IF THE INSURED IS NOT IN SOUND HEALTH AT THE TIME OF THE ISSUANCE AND DELIVERY OF THE POLICY.

The application for the policy in question in Part I just above the signature of the applicant (Tr. p. 22) provides:

> "It is agreed as follows: (1) that the insurance hereby applied for shall not take effect until the issuance and delivery of the policy and the payment of the first premium thereon while the proposed insured is in sound health."

This provision was made a part of the contract of insurance:

> "This policy is issued in consideration of the application therefor, copy of which is attached hereto, and which is made a part of this contract * * *" (Tr. p. 7.)

The condition thus agreed to was valid and binding upon the parties to the insurance policy.

The law recognizes that the parties to an insurance contract, like the parties to any other contract, may agree that it becomes effective only upon the happening of a designated event. Or they may agree that it will not be effective at all until and unless a specified condition is in existence at a specified time.

Thus, the parties may make it a condition to the taking effect of the insurance that the assured be in sound health. To give effect to such an agreement they may provide in the policy of insurance that it will not take effect unless the insured is in sound health at the time of the delivery of the policy.

No rule of law says that such a provision is inoperative or that an insurer may not so limit its liability. If the agreement be stated in unambiguous language, it is a valid binding condition precedent to the taking effect of the insurance.

While the validity of this clause in an insurance policy apparently has not been passed upon by the Supreme Court of the State of California, the rule recognizing it has long been followed by the federal Courts and by the majority of the state Courts. As has been held:

> "It is well settled that this clause in that contract, which provides that a policy shall not become effective unless delivered and received while the insured is in good health, is valid and will be enforced; and that the knowledge or acts of the insurer's local agent, or of any person other than those named in the contract as empowered to modify it, shall not be binding upon the insurance company nor constitute a waiver of contract provisions. This is the established rule in the national courts and is supported by the weight of authority in state jurisdictions."
>
> *Gill v. Mutual Life Insurance Co.* (C.C.A. 8), 63 Fed. (2d) 967, 970.

> "A stipulation in an application for a policy of life insurance, which is made a part of the policy

subsequently issued thereon, that such policy shall not take effect unless the same is actually delivered to the insured, during his life, and while he is in good health, is, except as restrained or forbidden by some statute, valid and enforceable. If the insured is at the time of the delivery of such policy actually afflicted with a disease which continues and ultimately causes his death, according to the weight of authority it is immaterial whether such condition existed at the date of his application or arose between that date and the delivery of the policy, or whether the insured knew his condition in that respect or not. In such cases such condition of health on the part of the insured at the time of the actual delivery of the policy is a defense to an action thereon, unless a valid waiver of such stipulation is shown."

Wright v. Federal L. Ins. Co. (Tex.), 248 S. W. 325.

The cases cited in the footnote * show the application of the rule by Federal Courts and by State Courts in Connecticut, Maryland, Massachusetts, Minnesota, Missouri, Ohio, Tennessee, Texas and Washington.

**Person v. Aetna Life Ins. Co.* (C.C.A. 8), 32 F. (2d) 459;
New York Life Ins. Co. v. Wertheimer (D.C. Ohio), 272 F. 730;
Subar v. N. Y. Life Ins. Co. (C.C.A. 6), 60 F. (2d) 239;
Gill v. Mutual Life Ins. Co. (C.C.A. 8), 63 F. (2d) 967;
Scharlach v. Pacific Mut. Life Ins. Co. (C.C.A. 5), 16 F. (2d) 245;
Aetna Life Ins. Co. v. Johnson (C.C.A. 8), 13 F. (2d) 824;
MacKelvie v. Mutual Ben. Life Ins. Co. (C.C.A. 2), 287 F. 660;

Connecticut:
Popwicz v. Metropolitan, 114 Conn. 333, 158 A. 885;
Keppel v. Metropolitan, 128 Conn. 591, 24 A. (2d) 888;

The cases holding to the contrary, it is submitted, are not based on sound reasoning and simply refuse, without any authority in law, to give effect to the agreement of the parties.

In this connection, the appellant respectfully points out that the language, by way of dictum, of this Court in *Mutual Life Insurance Co. v. Fray,* 71 Fed. (2d) 259, concerned a clause having different language from that in the case at bar, and that the Court's statement was made to depend upon this difference in the language. This Court there held that a finding of the jury that the assured was in good health could not be disturbed because the evidence on that question was conflicting.

Maryland:
Mutual Life Ins. Co. v. Willey, Md. Ct. of Ap., 106 A. 163;

Massachusetts:
Gallant v. Metropolitan L. Ins. Co., 167 Mass. 79, 44 N. E. 1073;
Barber v. Metropolitan Life, 188 Mass. 542, 74 N. E. 945;

Minnesota:
Murphey v. Metropolitan Life Ins. Co., 106 Minn. 112, 118 N. W. 355;

Missouri:
Farage v. John Hancock, Mo. Ct. of Ap., 81 S. W. (2d) 344;

Ohio:
Acacia Mutual Life Ins. Co. v. Kack, 57 O. Ap. 125, 12 N. E. (2d) 295;

Tennessee:
Commonwealth Life Ins. Co. v. Anglim, Ct. Ap. Tenn., 65 S. W. (2d) 239;

Texas:
Wright v. Federal Life Ins. Co., 248 N. W. 325;
Amer. Nat. Ins. Co. v. Jarrell, 50 S. W. (2d) 875;

Washington:
Logan v. New York Life Ins. Co., 107 Wash. 253, 181 Pac. 906.

The pertinent provision of the clause there in question provided:

> "That the proposed policy should not take effect unless and until delivered to and received by the insured * * * during the insured's *continuance* in good health * * *." (Italics are appellant's.)

The Court states in this regard that this condition was fulfilled if delivery of the policy was made while the insured was in the same state of health as he was at the time of his application and physical examination. It so held, it stated, because the language *continued* good health *relates* to the health of the applicant *as represented by him in his application* and medical examination; *implies* that the applicant *was then* in good health and requires merely a continuance of that state of health, whatever it may have been.

The statement of the Court in that case, it is respectfully submitted, is not in point in regard to the provision of the policy before the Court in the instant case. The language here is *not continued* good health. It does *not* relate to the health of the applicant as it was at the time of his application, and does *not* require merely that the applicant continue to be in the same state of health as he was at the time of his medical application.

Rather the language of the application in the instant case is an out and out requirement, without qualification, that the proposed insured be in sound health at the time of the delivery of the policy—regardless of his health at the time of the application:

> "* * * the insurance hereby applied for shall not take effect until the issuance and delivery of the policy * * * while the proposed insured is in sound health."

This language is unambiguous and direct. It leaves room for no construction and no interpretation except that it means just what it says, namely, that the insurance would not take effect until the delivery of the policy while the proposed insured is in sound health. The language that made possible the Court's statement in *Mutual Life v. Fray* is not present in the instant case. The Court's statement in that case, therefore—regardless of whether it be correct, or in conflict with the prevailing law—is not determinative of the instant case.

The identical language involved in the instant case was before the Circuit Court of Appeals for the Second Circuit in regard to another policy issued by the appellant here. In holding that the general rule did apply to this language that Court said:

> "It was undisputed that the death of the plaintiff's intestate was caused by cancer within three months after the date of each policy. It is likewise beyond dispute that the parties to the policies expressly agreed that the insurance would not take effect until the payment of the first premium was made while the proposed insured was in sound health. This was a valid condition upon the validity of the policies as contracts of insurance. Subar et al. v. New York Life Ins. Co. (C.C.A.) 60 F. (2d) 239, * * *
>
> "As the evidence in this case, considered in its entirety, did not show that the deceased was in

sound health when the policies were delivered, it was not proved that the insurance ever went into effect, and the motion to direct verdicts for the defendant should have been granted. * * *

"Because a new trial will be required, it is well to express our views on the burden of proof on the issue of sound health. There is authority to the effect that such a clause as these policies contained regarding the effective date of the insurance makes the question of sound health only a matter of defense, but that view seems to give too little force to the fact that the parties expressly agreed that no insurance should take effect until the policies were delivered and the first premiums paid while the proposed insured was in sound health. Regardless of what may be necessary in any particular case to prove sound health as of the decisive time either prima facie or ultimately, we think it is a condition precedent with the burden on the plaintiff to prove it by a preponderance of all the evidence in order to show that the defendant ever became bound as an insurer. New York Life Ins. Co. v. McCreary (C.C.A.) 60 F. (2nd) 355."

Greenbaum v. Columbia Nat. Life Ins. Co. (C.C.A. 2), 62 Fed. (2d) 56.

It is respectfully submitted, therefore, that, in accordance with the authorities cited, the provision of the application in question is a valid binding condition of the policy of insurance, and that the insurance does not take effect if the insured be not in sound health at the time of the delivery of the policy.

II.

THE EVIDENCE WITHOUT CONFLICT SHOWS THAT AT THE TIME OF THE ISSUANCE AND DELIVERY OF THE POLICY THE INSURED, QUANDT, WAS AFFLICTED WITH A CANCER OF THE COLON WHICH CAUSED HIS DEATH. THE COURT THEREFORE ERRED IN FINDING THAT THE INSURED WAS IN SOUND HEALTH AT THIS TIME.

The policy of insurance in question was delivered to the insured, Quandt, on the 4th day of December, 1943. He died on the 2nd day of April, 1944, of cancer of the bowel. (Tr. p. 78.)

The only testimony given on the question of whether Quandt had the cancer at the time of the delivery of the policy was that given by the witness, Dr. Warren L. Bostick, official deputy surgeon for the coroner of the City and County of San Francisco, and a pathologist in the Department of Pathology of the Medical School of the University of California. Dr. Bostick performed the autopsy on the body of the assured. In regard to whether the cancer had been present at the time of the delivery of the policy he testified:

> "Mr. Carroll. Q. Will you state to the Court, doctor, what you determined to be the cause of his death?
>
> Dr. Bostick. A. I did a complete examination on the body and upon opening the abdomen I saw immediately a diffused inflammation of all the abdominal contents; and further examination revealed a large mass in the region of the right portion of the abdomen, and this mass was a cancer, which cancer had spread, not only from the right side of the bowel but I also found it distributed and small nodules all through the liver. The cause

of death was a rupture of this cancer mass into the free abdominal cavity, with generalized inflammation.

Q. Doctor, can you give us an idea of the size of this cancer?

A. Well, as I examined it, the mass involved an area with a diameter of approximately six inches. It completely obliterated almost all the structure of the bowel on the right side, the large bowel.

Q. Doctor, how many of these autopsies have you done, approximately?

A. About three thousand.

Q. Basing your opinion, Doctor, on your experience and learning, can you indicate to the Court approximately how long that cancer had been there, or when it had commenced?

Mr. Dorn. That is objected to as irrelevant, incompetent, and immaterial.

The Court. Objection overruled.

A. That cancer had been there at least a year, based on what I have seen in a good many years of cancers, and from the general feeling that it takes a cancer approximately one year to completely surround a segment of the bowel; and this had, of course, much more than done that. It had invaded extensively into the surrounding tissue, and had also spread into the liver.

Mr. Carroll. Q. You say, Doctor, it had been there a minimum of a year?

A. Correct.

Q. In your opinion might it have been there longer?

A. It could have been.

Q. Doctor, the date of your examination I believe was the same day the death occurred?

A. I examined the patient on April 2, 1944. * * *'' (Tr. pp. 78 and 79.)

''Q. Doctor, is there any question in your mind, basing your answer on your experience and learning, that this cancer existed in this man in November, 1943, approximately five months prior to his death?

A. Oh, absolutely no doubt. There is not the slightest possibility that there was no cancer there. There is, positively.'' (Tr. p. 87.)

No other testimony was offered regarding the existence of the cancer at the time of the delivery of the policy. *Thus the evidence in the record is uncontradicted and without conflict that the assured had the cancer at the time of and prior to the delivery of the policy.*

It is respectfully submitted therefore that the Court's finding that the insured was in sound health at the time of the delivery of the policy is directly contrary to the only evidence on the subject.

CONCLUSION.

The evidence showing without conflict that the assured did have a cancer at the time of the delivery of the policy, as a matter of law he was not in sound health at that time, and since the application stated that the insurance did not take effect if he were not in sound health, the insurance provided by the policy did not take effect and no recovery can be had upon

the policy. It is submitted therefore that the judgment against appellant upon the policy is in error, and that it should be reversed.

Dated, San Francisco,
January 11, 1946.

KEESLING & KEIL,
FRANCIS CARROLL,
Attorneys for Appellant.